IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1157

ROBERT M. DUPAS, JR.,
Petitioner,

versus

CITY OF NEW ORLEANS,
TRAVELERS INSURANCE COMPANY, and
WILLIAM O. BROWN,
Respondents.

ORIGINAL BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Petitioner, Robert M. Dupas, Jr., files this original brief in response to the reply brief filed by respondents, City of New Orleans, Travelers Insurance Company, and William O. Brown.

I.

PETITIONER ADEQUATELY RAISED THE FEDERAL CONSTITUTIONAL QUESTION TO THE SUPREME COURT OF LOUISIANA.

In his Petition For Writ Of Certiorari to the Supreme Court of Louisiana, petitioner set forth in detail his argument supporting his contention that the action of the Louisiana Court of Appeal violated provisions of the Louisiana Constitution of 1974.

Petitioner contended in the same petition that the same facts and action of the Court of Appeal, as set forth therein, also violated the Fourteenth Amendment to the Constitution of the United States. Petitioner believed that to have repeated all of the previously set forth facts and arguments to support his federal constitutional question would have unduly burdened the Supreme Court of Louisiana with a rather lengthy petition. Therefore, footnotes which incorporated the full content of the text were used to raise the federal constitutional question.

Petitioner submits that those footnotes, together with the full text of the petition, adequately raised the issue in the Supreme Court of Louisiana.

In the case of *Harding v. Illinois*, 196 U.S. 78 (1904), cited by respondents, the petitioner therein merely stated that the state court erred for the reasons stated in his motion for new trial. The motion for new trial

contained only a general statement that the judgment was contrary to the United States Constitution and constituted taking property without the due process of law. (at p. 85). There was no brief or argument submitted to the state court on such points.

Petitioner submits that the situation in the *Harding* case is not similar to the instant case.

Petitioner urges that this Court find that he adequately and properly raised the federal constitutional question in the state court.

II.

THE JUDGMENT OF THE LOUISIANA COURT OF APPEAL IS NOT SUPPORTED BY INDEPENDENT AND ADEQUATE GROUNDS UNDER LOUISIANA LAW.

Respondents merely conclude that:

> "However, in view of the fact there must be some support in Louisiana law for the Louisiana Supreme Court's refusal of the petitioner's writ in this case, the Supreme Court should apply this doctrine and deny the petitioner's writ for certiorari." (Brief, p. 6).

The Supreme Court of Louisiana refused a writ without comment. (See, Appendix D, p. 91a).

Respondents do not cite the Louisiana law they claim supports the Louisiana Court of Appeal's judgment.

Petitioner submits, therefore, that there is none, and respondents' contention should be rejected.

III.

THE LOUISIANA COURT OF APPEAL USED AN IMPROPER TEST IN DETERMINING PETITIONER'S GENERAL DAMAGES.

The Court Of Appeal's Test

Petitioner's claim of unconstitutional action on the part of the Louisiana courts is limited to the unusually low award of $50,000.00 for general damages. (Petition, p. 7). The Louisiana court's awards for special damages, such as lost wages, impairment of earning capacity, and past and future medical expenses, are not at issue herein.

Respondents claim that petitioner misconstrued the Louisiana Court of Appeal's reference to the "ordinary man." (Brief, p. 6). Petitioner did not misconstrue the Louisiana Court of Appeal's language for it stated in no uncertain terms that:

> ". . . this case presents problems not ordinarily found in damage suits. Dupas' lifestyle prior to the injury was not that of the so-called 'ordinary man' that courts usually use as a standard for a comparison in assessing damages." (Petition For Writ Of Certiorari, Appendix A, p. 6a).

In other words, according to the Court of Appeal, the instant case was one of the few cases that involved a plaintiff whose lifestyle did not conform to that of an "ordinary man."

Clearly, the Court of Appeal compared petitioner's general damages to that of an ordinary man's general damages. Petitioner has shown that the ordinary man test is not the test used in Louisiana.

Petitioner can see no compelling reason why the Court of Appeal should, as it indicated it would (and did), award one plaintiff with petitioner's massive injuries and residuals one amount for general damages (*i.e.*, past and future pain and suffering) and another plaintiff a different amount, depending on whether such plaintiff was a man of wealth, poverty stricken, or of average means, and whether such plaintiff was a person with a criminal record or one with no criminal record at all.

A plaintiff's general damages are the same, whether he is a scientist with no criminal record or whether he is a person who has been convicted of a crime and who has struck his wife with a gun on one occasion.

Prior to this accident on October 15, 1973, petitioner was a 27 year old male, in good health and enjoying the

normal pleasures of married life and the companionship of two children, ages 6 and 2. He went to church on Sundays, and took his wife and children places. (Tr. V-27).

He liked fishing, crabbing, hunting, going to the drive-in, going to the zoo and circus, drafting, and reading. (Tr. 219-21, V-26-7, V-59, V-60-1, V-64). He did things with his wife and children. (Tr. 221-2, V-61). Petitioner helped his daughter with her homework. (Tr. V-26). He talked a lot before the accident. (Tr. 220, V-60-1). He displayed an interest in girls and women, and had a lot of friends. (Tr. V-59-61). Petitioner read extensively, and could talk about any subject, especially about animals and the earth. (Tr. V-64).

He had every reasonable expectation of living out his life in a normal way, earning a living at a regularly increasing rate, raising his standard of living as he grew older and earned more, and seeing his children grow and do well in life, all without the physical and mental pain and suffering he has endured and will continue to endure for the rest of his life. But then petitioner suffered this accident at the hands of a New Orleans police officer. Petitioner's injuries and residuals resulting from this accident are set forth in his Petition For Writ Of Certiorari, Appendix C, p. 32a-36a.

Now, petitioner lives with his parents, (Tr. V-21, V-61), his children are afraid of him, (Tr. V-28), and all he does is sit around the house listening to stereo, and

plays with the cat in the backyard. He doesn't go anywhere, and he has no friends. (Tr. 420, V-28, V-59-61).

Petitioner submits that an award based on his injuries and residuals should be made without regard to his lifestyle. Petitioner's general damages are the same, whether or not he had been convicted of a criminal offense, and whether or not his behavior is classified as anti-social.

Respondent's position that a bum with petitioner's injuries and residuals should be awarded less in general damages than a nuclear scientist with petitioner's injuries and residuals should shock one's conscience.

Errors Set Forth In Respondents' Reply Brief

Petitioner realizes that the transcript of the testimony is not before the Court, and therefore, hesitates to enter into a factual debate with respondents. However, petitioner feels compelled to mention certain errors or misstatements of fact that respondents set forth in their Brief.

1. Respondents state that ". . . the medical evidence shows to an equally definitive degree that plaintiff made a remarkable recovery from his injury, that he is physically and mentally functional, and continued to exhibit improvement right up to the time of trial." (Respondents' Brief, p. 7).

This statement is erroneous and is based on Dr. Kline's testimony that plaintiff "had made a rather remarkable recovery, albeit incomplete, but nonetheless he recovered a good deal of function after a nearly fatal head injury." (Tr. 26).

Dr. Kline's testimony must be taken in context. Certainly, to the treating physician the fact that petitioner was alive and able to walk and speak constituted a "remarkable recovery." This statement, in conjunction with all of Dr. Kline's testimony did not mean that Dr. Kline believed petitioner had "recovered."

2. Respondents refer to Dr. Kline's opinion regarding petitioner's ability to work. (p. 7).

The transcript, at pp. 25-27 and p. 46, says nothing about petitioner's ability *vel non* to work or any other point stated in respondent's text.

However, Dr. Kline did testify that it would be difficult for petitioner to "nail down and keep a job." (Tr. 34).

Dr. Cook, contrary to respondents' understanding of her testimony, stated that petitioner could work "in a sheltered workshop with some supervision." (Tr. 421). She defined "sheltered workshop" as "something for the neurologically handicapped, retarded where adult retardants are." (Tr. 421). Clearly, Dr. Cook's opinion is opposite to what respondents understand her opinion to be.

3. Respondents claim that petitioner suffered no pain. (Brief, p. 7-8).

The record shows that petitioner has suffered physical and mental pain. (Petition For Writ, Appendix C, p. 31a-32a).

4. Respondents' position from the very beginning of this case to its present brief before this Court has been that petitioner "suffered a serious head injury from which he has significant residuals," (Brief, p. 7), but that petitioner's lifestyle was not that of an average law-abiding, productive, socially integrated and responsible citizen." (Brief, pp. 11-12).

Respondents' opinion of petitioner, consistently throughout the course of this case, has been and still is that petitioner was a consistently erratic, irresponsible, criminally prone, violent, drug dependent, disillusioned, depressed, paranoic, ambitionless and nonproductive man-child." (Brief, p. 16).

Respondents consistently closed its arguments in all of the courts below, as they do herein, with a statement that petitioner and society are better off now, because of petitioner's injuries. (Brief, p. 17).

Shockingly enough, three judges out of three on the Louisiana Court of Appeal panel agreed with respondents' view of the damages aspect of the case,

stated so in no uncertain terms, and made an award accordingly. (Petition For Writ, Appendix A, pp. 1a-11a).[1]

Petitioner submits that respondents, in citing all of the horrible, bad, criminal and anti-social aspects of petitioner's life through ten pages of printed brief filed in this Court, (Brief, pp. 7-17), supports and corroborates the contentions and arguments petitioner set forth in his Petition For Writ Of Certiorari filed herein.

Petitioner suggests that respondents' Brief, as aforesaid, is ample proof that the low award made to petitioner was only because of his lifestyle and for no other reason.

5. Respondents refer to petitioner's grades on the California Achievement Test, (Brief, p. 9), which petitioner made prior to this accident.

Petitioner submits that petitioner's high grades (12th grade and first year college) are significant, even though respondents attempt merely to pass over them.

Further, petitioner's grades on the GED tests (again, made before this accident) were rather high. Respondents' assessment of the percentiles are erroneous. Petitioner's scores were as follows:

---

1 Particularly shocking is the Court of Appeal's finding that "[W]hile it might be said from some abstract point of view, that Dupas' lifestyle is an improvement insofar as society in general is concerned, nevertheless we note that. . . ." (Petition For Writ, Appendix A, p. 10a).

a. On the first test, he scored higher than 39% of the persons taking the test.

b. On the second test, he scored higher than 69% of the persons taking the test.

c. On the third test, he scored higher than 61% of the persons taking the test.

d. On the fourth test, he scored higher than 26% of the persons taking the test.

e. On the fifth test, he scored higher than 41% of the persons taking the test. (Tr. 129).

Clearly, then, petitioner achieved scores on two of the five tests in the upper 30-39% of the total, and in the third test, in the upper 41% of the total.

Thus, considering both his GED scores and his California Achievement Test scores, it can be seen that before this accident petitioner was not the complete mentally deficient person that respondents paint him to be.

6. Respondents' claim that petitioner's head injury resulted in little or no reduction intellectually or in the area of mental achievement is not true. (Brief, p. 11).

Prior to this accident petitioner did well on the California Achievement Test and on the GED test, through which he obtained his high school equivalency diploma. (See, paragraph 5, above.) A GED diploma

allows a graduate to enter any state owned-operated university, college, trade school, or vocational school. (Tr. 123).

Petitioner submits that his intellectual capacity before this accident is a far cry from his "retardant level" found by Dr. Cook. (See, paragraph 2, *supra.*)

7. Respondents state that Dr. McFarland questioned the validity of the California Achievement Test scores petitioner made, (Brief, p.11), citing Tr. 466-67. Their statement is a misstatement of fact.

The transcript clearly shows that regarding the GED and California Achievement Test scores, Dr. McFarland was asked a hypothetical question which did not consider any subsequent formal training, including night school. (Tr. 467, 475). The record shows that petitioner attended night school before taking the GED test, (Tr. 137), and the record further shows that it was not known whether petitioner took the California Achievement Test before or after attending night school. (Tr. 141).

To state as respondents have stated is pure conjecture.

8. Respondents claim Dr. McFarland testified to the effect that:

> ". . . inasmuch as Dupas had been purposefully and specifically tutored both for the qualifying California Achievement Test and the subsequent GED test, that such undoubtedly had a significant influence in the scores Dupas attained therein. Tr. Vol. IV, pgs. 475-477." (Brief. p. 11).

This is a misstatement of the testimony. The question asked Dr. McFarland and his answer is as follows:

> "Q. Let's consider it across the board, if somebody specifically and expressly and purposefully tutored for a test, he's going to get better results in that test than would perhaps his academic background afforded him than if he wasn't specifically tutored for it?
>
> "A. That makes sense to me, yes, sir.
>
> "Mr. Selman: Thank you." (Tr. 477).

9. Respondents fail to state in their scathing personal attack on petitioner (Brief, pp. 11-17), that:

a. Petitioner was arrested only once after the burglary charge.

b. Petitioner struck his wife with a gun once.

c. Petitioner was paroled from the Louisiana State Penitentiary on his burglary conviction.

d. Petitioner was granted a pardon by the Governor of Louisiana of the burglary conviction.

e. Petitioner voluntarily committed himself to the Louisiana State Hospital at Mandeville.

10. Respondents claim that petitioner "split her [petitioner's wife's] head open with a gun" is a misstatement of the testimony. (Brief. p. 12).

On this point petitioner's wife testified on cross-examination by Mr. Selman as follows:

"Q. Now, in 1969 you are aware that he was confined and admitted to the Southeast Louisiana Hospital in Mandeville?

"A. Yes, I went with him. We had an argument a few days before and it resulted in him hitting me and beating me and he realized that he needed some sort of help. He went down himself and committed himself. We went through quite a bit so he could get into Mandeville. We went to Charity Hospital and there was going to be a waiting list so we went to a private psychiatrist and they referred him to the mental health clinic and they expedited matters and I went with him. He did it himself." (Tr. Vol. V-35-6).

11. Respondents' claim that petitioner attempted to kill his two year old child is a misstatement of the testimony. (Brief. p. 12).

Petitioner's wife testified at the trial on cross-examination by Mr. Selman as follows:

"Q. And there was also an episode where he attempted to do away with your daughter, isn't that true?

"A. He was — this happened the same night [*i.e.*, the same night that petitioner struck her]. He was real strange that night. I had left. I was tired of his not working and being, you know, like he was so I left. And he decided that he wanted to kill himself and everyone else. This is one of the facts that led up to him going to Mandeville. He knew he needed help." (Tr. Vol. V, p. 36).

Cases Cited By Respondents On Damages

Petitioner first observes that the cases cited by respondents in their Brief, pp. 18-22, are comparatively old. Petitioner, on the other hand, cited cases decided as recently as 1977. Inflation and changed economic conditions may be considered in awarding amounts for general damages. *Goutierrez v. Travelers Insurance Co.*, 107 So.2d 847, 852-3 (La. App. 1959); *Prine v. Continental Southern Lines*, 71 So.2d 716, 723 (La. App. 1954).

In *Guidry v. Canal Insurance Company,* 313 So.2d 860 (La. App. 1975) the court held that plaintiff's injury had stabilized to what would be no more than a nagging back ache. (at p. 682). Plaintiff's paralytic ileus condition presumably (the opinion is unclear) lasted only from the time of the accident, September 24, 1971, to his release from the hospital October 7, 1971.

In *Howard v. Scandalito,* 333 So.2d 657 (La. App. 1976), the trial court, contrary to what respondents are reporting to this Court, awarded $50,000.00 for general damages for injuries (sustained in a second accident), which award was affirmed by the Court of Appeal. The distinguishing feature of the *Howard* case to the case at bar is that Mr. Howard had suffered severe brain damage in the previous accident. Further, his attending physicians attributed the cause of most of his injuries to the first accident and not to the second accident. (at p. 661).

From reading the reported case, it appears that Mr. Howard's condition of being "senile, not oriented as to date or time, not able to do simple addition or subtraction" was temporary.

In *Watts v. Town of Homer,* 301 So.2d 729 (La. App. 1974), the award for general damages was $150,000.00, compared to petitioner's award of $50,000.00. Additionally, the injured person in *Watts* was a seventeen month old child. She was twelve years old, as claimed by respondents, at the time of the appeal. The

extent of the injuries of small children are difficult to determine.

In *Smolinski v. Taulli,* 285 So.2d 577 (La. App. 1974), writ ref., the Court of Appeal stated that the plaintiff's physicians were unable to determine the extent of damage. (at p. 579). The Court nevertheless awarded $75,000.00, as compared to $50,000.00 awarded in the instant case. As in *Watts v. Town of Homer, supra.,* the injured person was an infant.

In *Wright v. Romano,* 279 So.2d 735 (La. App. 1973), writ ref., the distinguishing factor is that the plaintiff in *Wright* did not suffer brain amputation or paralysis, as did petitioner herein. Additionally, petitioner was awarded $85,000.00 in 1973, as compared to petitioner's award of $50,000.00 in 1978, for injuries that were not as serious as those suffered by petitioner.

In *Cline v. Ware,* 271 So.2d 587 (La. App. 1973), petitioner agrees that the plaintiff in that case suffered severe injuries. However, respondents fail to inform this Court that the Supreme Court of Louisiana granted writs to determine the adequacy of the amount of the award. *Cline v. Ware,* 274 So.2d 708 (La. 1973). On checking the Supreme Court of Louisiana record, (No. 53277), it was discovered that on June 14, 1973, the appeal was dismissed on joint motion. Presumably, plaintiff and defendants resolved their differences, undoubtedly for an award much higher than that made by the Court of Appeal.

In *Wood v. State Department of Highways*, 338 So.2d at 739 (La. App. 1976), writ ref., in affirming an award of $100,000.00, the Court of Appeal stated:

> "While we find the award *on the low side*, we are unable to conclude that the trial court's large discretion in these matters has been breached. We therefore affirm the amount of the award assessed by the trial court." (at p. 740). (emphasis added).

IV.

A CERTIFICATE OF SATISFACTION DOES NOT PRECLUDE AN APPEAL.

All petitioner did in executing a Satisfaction of Judgment was to acknowledge payment of the judgment, plus interest. It does not act as a release or dismissal. It merely terminates the accrual of interest, and precludes petitioner from collecting the same amount twice.

Accordingly, respondents' contention should be rejected.

V.

CONCLUSION

Petitioner submits that in the instance where a fully briefed argument on state constitutional grounds applies to federal constitutional grounds, as in the instant case, the citing of the federal constitutional issues to the state court through footnotes that incorporates the fully briefed argument adequately and properly raises the federal constitutional questions in the state court.

Respondents claim there were adequate grounds for the Supreme Court of Louisiana to refuse petitioner's petition for writ of certiorari but have not cited those grounds. The Supreme Court of Louisiana gave no reasons for its denial.

Petitioner's argument that the award of $50,000.00 for general damages is the result of unconstitutional actions, reasons, rationale, and theories is supported by respondents' Brief filed in this Court. Rather than argue the merits and law of petitioner's injuries and the deficits caused by his injuries, respondents devoted page after page to an attack on petitioner's character, morals, and lifestyle. Respondents are consistent. Their strategy of attacking petitioner personally, as shown in their Brief before this Court, has been their strategy throughout this case, beginning in the trial court.

Petitioner submits that the Satisfaction of Judgment is nothing more than just that, *i.e.*, a certificate that respondents have paid the judgment rendered against them. Nowhere therein is there any mention of any restriction of petitioner's right to appeal, nor is there any mention therein that petitioner's case is dismissed.

Petitioner reiterates his previous argument that the Louisiana Court of Appeal has so far departed from the well-settled rules and tests applicable to damages in tort law which have been laid down by the Louisiana statutes and the Supreme Court of Louisiana, and the Supreme Court of Louisiana has so far sanctioned such a departure by the Court of Appeal by denying petitioner's Petition For Writ, as to call for an exercise of this Court's power of supervision. See, Rule 19, Supreme Court Rules.

In none of the cases on damages cited by petitioner in his Petition For Writ Of Certiorari to this Court, nor in the cases on damages cited by respondents in their Brief before this Court, was there any mention of character, lifestyle, criminal activity, morals, etc. Further, undersigned counsel has never seen any mention of such factors in any other reported Louisiana case on damages, and has heard of none, until the instant case.

Clearly, these rules and tests laid down by the Louisiana Court of Appeal in the instant case have never been applied before and undoubtedly will never be applied again.

Petitioner submits that he has been the victim of invidious discrimination of a shocking nature. Only this Court has the power to right the terrible injustice handed to petitioner.

Petitioner urges this Court to grant Certiorari, require that this case be briefed and argued, and see for itself from the transcript of the testimony and the documents admitted in evidence the true facts of this case.

If this Court would do so, petitioner is confident that this Court will remand this case to the Supreme Court of Louisiana and order that Court to decide the question of damages consistently with constitutional principles, both state and federal.

Respectfully submitted by,

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March 9, 1979

VI.

CERTIFICATE

I certify that I served the foregoing brief in reply to respondents' brief in opposition to petition for writ of certiorari on defendants by mailing or delivering three copies of same to James L. Selman, II, Esq., Attorney at Law, 28th Floor, 225 Baronne Bldg., New Orleans, Louisiana 70112, and Thomas P. Anzelmo, Sr., Esq., Assistant City Attorney, City of New Orleans, 1300 Perdido Street, New Orleans, Louisiana 70112, on March 9, 1979.

GERALD P. AURILLO